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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN MATTHEW HORAN,

Defendant and Appellant.

A158545

(Solano County  
Super. Ct. Nos. FCR333524,  
FCR325012)

This appeal by defendant Bryan Matthew Horan presents a single issue regarding the result of striking a one-year prison enhancement previously imposed as part of a plea bargain pursuant to the subsequently revised provisions of Penal Code section 667.5, subdivision (b).<sup>1</sup> Now that defendant is no longer eligible for the enhancement, whose scope was substantially narrowed by Senate Bill No. 136 (2019–2020 Reg. Sess.) (Senate Bill 136), should we simply strike the enhancement and reduce defendant’s sentence by one year, or should we instead remand to allow the prosecution the option of withdrawing from the plea bargain entirely? A different panel of this court faced the same issue in *People v. France* (Dec. 15, 2020, A158609) \_\_ Cal.App.5th \_\_ (*France*), and held “that Senate Bill 136 requires a court to

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<sup>1</sup> All statutory references are to the Penal Code except as otherwise noted.

strike the one-year enhancements while leaving the remainder of the plea bargain intact.” (*Id.* [p. 21].) Following *France*, we will strike the enhancement and modify the sentence accordingly.

### **BACKGROUND**

In October 2017, according to defendant’s probation report, police officers stopped a vehicle in which he was a passenger, and he fled, discarding several baggies of heroin. Police apprehended him and found nearby a loaded gun, ammunition, and a wallet holding credit and debit cards and account information belonging to three other people.

The district attorney filed an eight-count amended complaint charging defendant with drug and firearm offenses, resisting arrest, and identity theft.<sup>2</sup> Pursuant to a plea bargain, defendant pled no contest to two felony counts and one misdemeanor and admitted a prior strike, a prior prison term within the meaning of Penal Code section 667.5, subdivision (b), and violations of probation in several prior cases. In return, the prosecutor dismissed the other five counts in this case (subject to a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754) and dismissed all counts in a separate criminal action. The parties agreed that defendant would receive a sentence of eight years, four months in prison for “everything.” Specifically, the plea agreement was to a base term of three years for possession of a controlled substance while armed (Health & Saf. Code, § 11370.1), and a consecutive term of eight

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<sup>2</sup> The counts were (1) possession of a controlled substance (Health & Saf. Code, § 11351); (2) possession of a controlled substance while armed (*id.*, § 11370.1, subd. (a)); (3) possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)); (4) possession of ammunition by a person prohibited from possessing firearms (Pen. Code, § 30305, subd. (a)(1)); (5) resisting arrest (Pen. Code, § 148, subd. (a)(1)); and (6)–(8) theft of identifying information belonging to three separate persons (Pen. Code, § 530.5, subd. (c)(1)). The first four counts were felonies; the last four, misdemeanors.

months for unlawful possession of ammunition (Pen. Code, § 30305, subd. (a)(1)), all doubled because of defendant's prior strike conviction (Pen. Code, §§ 667, subd. (d), 1170.12, subd. (c)(1)) and then enhanced by one year for the prior prison term (Pen. Code, § 667.5, subd. (b)). Concurrently, defendant would serve terms for resisting arrest (Pen. Code, § 148, subd. (a)(1)) and for the probation violations.

At a hearing in September 2019, the court imposed the agreed upon sentence. Without requesting a certificate of probable cause, defendant timely filed a notice of appeal, challenging only matters that postdate, and do not affect the validity of, his plea. (Cal. Rules of Court, rule 8.304(b)(4)(B).)

### **DISCUSSION**

When defendant entered into the plea agreement and was sentenced in conformity with it, “section 667.5, subdivision (b) required a one-year enhancement for each prior separate prison term served for ‘any felony,’ with an exception not applicable here. (Stats. 2018, ch. 423, § 65.) In 2019, [Senate Bill 136] was passed. It changed this enhancement to apply only to a prior prison term served ‘for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.’ (§ 667.5, subd. (b).) In other words, [Senate Bill 136] limited the imposition of a sentence enhancement under section 667.5, subdivision (b) to prior prison terms resulting from convictions for sexually violent offenses. (Legis. Counsel's Dig., [Sen. Bill No. 136] ch. 590.)” (*People v. Matthews* (2020) 47 Cal.App.5th 857, 862 (*Matthews*).)

The revision took effect on January 1, 2020 and admittedly applies to cases, such as this one, in which the decision is not yet final. (*France, supra*, \_\_ Cal.App.5th \_\_ [p. 4]; *In re Estrada* (1965) 63 Cal.2d 740, 745–748.) The parties agree that this court has jurisdiction over defendant's appeal

notwithstanding his failure to seek a certificate of probable cause. (*Matthews, supra*, 47 Cal.App.5th at pp. 862–864, citing Cal. Rules of Court, rule 8.304(b)(4)(B).) The parties also agree that under the current version of section 667.5, subdivision (b), the one-year enhancement must be struck from defendant’s sentence, as his prior prison commitment was not for a sexually violent offense. “A conviction cannot stand on appeal when it rests upon conduct that is no longer sanctioned.” (*People v. Collins* (1978) 21 Cal.3d 208, 214 (*Collins*).)

The Attorney General argues that we should remand with instructions to strike the enhancement and allow the district attorney either to accept the reduced sentence or to withdraw from the plea agreement. Defendant urges us to strike the one-year enhancement ourselves, and to remand with an order to the trial court to prepare a corrected abstract of judgment. For the reasons stated in *France* and summarized below, defendant has the better argument.

In *Doe v. Harris* (2013) 57 Cal.4th 64 (*Doe*), “[o]ur Supreme Court held that plea agreements will generally be deemed to incorporate and contemplate the state’s reserve power to change the law. ([*Id.*] at pp. 66, 73.) As a result, the mere fact that parties have entered into a plea agreement ‘does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them,’ and ‘requiring the parties’ compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement.’ (*Ibid.*)” (*France, supra*, \_\_ Cal.App.5th \_\_ [p. 12].)

In *Harris v. Superior Court* (2016) 1 Cal.5th 984 (*Harris*), the Supreme Court applied this principle to the case of a defendant seeking to have a nonviolent felony conviction reduced to a misdemeanor pursuant to

Proposition 47. (*Id.* at p. 987.) The defendant in *Harris* had pled guilty to grand theft from the person, admitted a strike prior, and agreed to a six-year sentence in exchange for the People dismissing a robbery count and other charges. (*Id.* at p. 988.) “*Harris* considered whether the People were entitled to set aside [this] plea agreement when the defendant sought to have his sentence based on the agreement recalled under Proposition 47[],” and concluded the People were not. (*France, supra*, \_\_ Cal.App.5th \_\_ [pp. 12–13].) *Harris* observed that by its plain language Proposition 47’s resentencing provision applies to convictions “by trial or plea” (§1170.18, subd. (a)), and the expressed intent of the proposition would be frustrated “if the prosecution could respond to a successful resentencing petition by withdrawing from an underlying plea agreement and reinstating the original charges filed against the petitioner.” (*Harris*, at pp. 991–992.) *Harris* also supported its conclusion with a principle derived from *Doe*: that the Legislature or the electorate may change the law so as to “‘modify or invalidate the terms of an agreement.’” ([*Doe, supra*, 57 Cal.4th] at p. 70.) . . . . The electorate may bind the People to a unilateral change in a sentence without affording them the option to rescind the plea agreement. The electorate did so when it enacted Proposition 47.” (*Harris*, at p. 992.)

Following *Harris*, we conclude that Senate Bill 136 also binds the People to a unilateral change in defendant’s sentence. We acknowledge that Senate Bill 136 does not expressly state that it applies to convictions by plea as well as by trial, but we do not view the absence of such language as dispositive.

We think the statute’s silence with regard to plea agreements is most naturally interpreted to mean that a conviction by plea should be handled the same way as any other conviction—namely, that the now-inapplicable

enhancement should be stricken and the sentence reduced accordingly. And we note that the parties do not dispute that Senate Bill 136 applies to convictions by plea, such as this case; they disagree only as to whether the plea remains binding once Senate Bill 136 is applied. Like the *Harris* court, we are also concerned that if the People were to prevail on their theory that applying the ameliorative statute entitles them to have the plea set aside, this would frustrate lawmakers' intent to reduce prison sentences for certain offenders. (See *Harris, supra*, 1 Cal.5th at p. 992; *France, supra*, \_\_ Cal.App.5th \_\_ [p. 18].) And most importantly, we conclude with *Harris* that *Doe* teaches the Legislature may “modify or invalidate the terms of” a plea agreement without entitling the People to have that plea set aside. (*Harris*, at p. 992; see *France, supra*, \_\_ Cal.App.5th \_\_ [pp. 19–20].)

The Attorney General urges a contrary result based on an overly broad reading of our Supreme Court's recent decision in *People v. Stamps* (2020) 9 Cal.5th 685 (*Stamps*). (See *France, supra*, \_\_ Cal.App.5th \_\_ [p. 16].) *Stamps* addresses a different kind of ameliorative statute, Senate Bill No. 1393 (2017–2018 Reg. Sess.) (Senate Bill 1393), which amended subdivision (a) of section 667. Formerly, section 667, subdivision (a) mandated a five-year sentence enhancement for a defendant previously convicted of a serious felony and then convicted of a new serious felony. (Stats. 2018, ch. 1013, §§ 1, 2; see *Stamps*, at pp. 692–693.) Senate Bill 1393 gave courts discretion to strike such an enhancement in the interest of justice pursuant to section 1385. (*Stamps*, at pp. 693, 700.) *Stamps* held that Senate Bill 1393 applied retroactively to an enhancement imposed pursuant to a plea bargain dictating a specific prison term, so that a case not yet final must be remanded for the trial court to exercise its newly conferred discretion whether to strike the enhancement. (*Stamps*, at pp. 698–700.) However, should the trial court

choose to exercise that discretion and strike the enhancement, the People must be afforded the opportunity to rescind the plea agreement entirely, *Stamps* held. (*Id.* at p. 707.)

The *Stamps* Court explained that section 1385 “ordinarily does not authorize a trial court to exercise its discretion to strike [an enhancement] in contravention of a plea bargain for a specified term.” (*Stamps, supra*, 9 Cal.5th at p. 700.) Once a court approves a plea bargain, “long-standing law limits [its] unilateral authority to strike an enhancement yet maintain other provisions of the plea bargain” without affording “‘an opportunity to the aggrieved party to rescind the plea agreement and resume proceedings where they left off.’” (*Id.* at p. 701.) Because the legislative history of Senate Bill 1393 demonstrates no “intent to overturn existing law regarding a court’s lack of authority to unilaterally modify a plea agreement,” the trial court must offer the prosecution the option of rescinding the plea agreement if it strikes an agreed upon term. (*Stamps*, at pp. 702, 707.) The alternative of “allowing the trial court to strike the defendant’s serious felony enhancement but leave the rest of the plea bargain untouched would give the court a power for serious felony enhancements that it lacked for any other enhancement and therefore run contrary to Senate Bill 1393’s intent to create uniform trial court discretion as to all sentencing enhancements.” (*France, supra*, \_\_ Cal.App.5th \_\_ [p. 15] [citing *Stamps, supra*, at p. 704].)

*Stamps* is readily distinguishable here because Senate Bill 136 does not give a trial court discretion unilaterally to strike any enhancement. Instead, the Legislature itself has decided that a one-year enhancement not based upon a prior conviction for a sexually violent offense must be stricken. The identity of the decisionmaker is dispositive since, as *Stamps* recognizes, the *Legislature* “‘may bind the People to a unilateral change in a sentence

without affording them the option to rescind the plea agreement,’ ” even as the trial court may not bind the People unilaterally. (Compare *Stamps*, *supra*, 9 Cal.5th at p. 703 [quoting *Harris*, *supra*, 1 Cal.5th at p. 992] with *Stamps* at p. 707; see *France*, *supra*, \_\_ Cal.App.5th \_\_ [pp. 18–20].) That Senate Bill 136 gives a trial court no discretion is also important because it means, unlike in *Stamps*, that when a case is remanded under Senate Bill 136 the trial court will have no way to preserve a plea agreement without the prosecutor’s consent. Where the prior conviction is not for a sexually violent offense the one-year enhancement *must* be stricken, so the prosecutor would, if we adopt the Attorney’s General position, have the option in every remanded case to have the plea agreement set aside and the charges reinstated. (See *France*, *supra*, \_\_ Cal.App.5th \_\_ [pp. 20–21].) Whereas, in a case remanded under Senate Bill 1393, the trial court can choose not to strike the enhancement and preserve the plea agreement, a trial court applying Senate Bill 136 has no such option because an enhancement “cannot stand . . . when it rests upon conduct that is no longer sanctioned.” (*Collins*, *supra*, 21 Cal.3d at p. 214.)

We recognize that our colleagues in the Fifth District Court of Appeal, and more recently in Division Five of this court, have reached a different conclusion when addressing the same issue we decide today. (See *People v. Hernandez* (2020) 55 Cal.App.5th 942, 944–945, 946–948 [allowing the People to withdraw from a plea agreement when a one-year enhancement is stricken pursuant to Senate Bill 136]; *People v. Griffin* (Nov. 30, 2020, A159104) \_\_ Cal.App.5th \_\_ [2020 Cal.App. Lexis 1138] [same]; *People v. Joaquin* (Dec. 4, 2020, A152786) \_\_ Cal.App.5th \_\_ [2020 Cal.App. Lexis 1151] [same].) But we find *France* the better-reasoned opinion and follow it here.

## **DISPOSITION**

The one-year enhancement imposed pursuant to section 667.5, subdivision (b) is stricken. The trial court is ordered to amend the abstract of judgment in accordance with this opinion, and to forward a certified copy of the amended judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

**TUCHER, J.**

**I CONCUR:**

**STREETER, J.**

**POLLAK, P.J., Dissenting:**

For the reasons stated in my dissenting opinion to this court's decision in *People v. France* (Dec. 15, 2020, A158609) \_\_ Cal.App.5th \_\_, I respectfully dissent. As in *People v. France*, I believe that upon striking the enhancement, the People should be given the opportunity to withdraw from the plea bargain.

POLLAK, P. J.